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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1258

GEORGE S. HEITZLER, JR.,

Petitioner,

v.

CINCINNATI BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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RELEVANT STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions cited by petitioner, the following provision of the Constitution of the State of Ohio is relevant:

ARTICLE IV: JUDICIAL

§ 2 The supreme court.

(A) . . .

(B) (1) The supreme court shall have original jurisdiction in the following: . . .

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(Amended May 7, 1968.)

At the time that the complaint in this matter was filed Rule XVIII was in effect and not Gov. Rule V as set forth

in the petition. The entire text of Rule XVIII is set forth in the appendix of this brief. Rule XVIII is a well thought out, reasonable, fair, workable rule for disciplinary proceedings against attorneys, which has become a model for the rules of other states. Its efficacy should not be disturbed in any manner by this court.

COUNTERSTATEMENT OF FACTS

Although petitioner's summary of the complaint filed against the petitioner at the commencement of the disciplinary proceedings (pet. p. 9) is misleading, since the entire complaint is reproduced in petitioner's appendix, it will serve no useful purpose to point out the errors in the summary. This court is respectfully referred to the entire complaint: not petitioner's summary thereof.

The disciplinary proceedings of the Supreme Court of Ohio as set forth in Rule XVIII provided for hearing which hearings were generally held in the county in which the respondent resided. Nevertheless, in this case, at the request of Judge Heitzler and to accommodate him the Board of Commissioners on Grievances and Discipline ordered the hearings held in Dayton, Ohio (pet. App. p. A-17), a distance of some 60 miles away from Cincinnati, in order to avoid unfavorable publicity which Judge Heitzler feared might develop to his prejudice.

In footnote 1, (pet. p. 10) petitioner says: "At the close of the hearings before the Panel, the Bar Association added Canon 29 to the other Canons of Judicial Ethics which Petitioner allegedly violated." The fact is that petitioner voiced no objection to the addition, (T. 1398 and 1399). Also, the conclusion of the Panel with respect to violation of Canon 29 is supported by the same facts which were the basis for the complaint against petitioner. Nothing new was added which deprived petitioner of his right fully to defend the charges made against him. Canon 29

is obviously related to the Harmony Loan charges which are set forth in paragraph 9 of the complaint.

On page 14, petitioner refers to minutes of the Board of Commissioners on Grievances and Discipline, an excerpt of which appears in his appendix, pages A96-A97. The excerpt is misleading because it would appear that the only business considered by the Board of Commissioners on Grievances and Discipline on August 4, 1972 was the complaint against petitioner. Such was not the case. There are, though they are obscure, three asterisks indicating an omission (pet. App. p. A97) which shows that other matters were considered and Gordon A. Scherer, as a member of the Board, was therefore properly present to consider these other matters. It is obvious, from reading the minutes, that he took absolutely no part in the discussion of decision on the Heitzler case.

Petitioner should find no comfort in the fact that "the Ohio Grand Jury did not return a true bill" (pet. p. 14). The "Ohio Grand Jury" urged the continued investigation of Heitzler in the following language:

> The jury regrets the initial reticence of the Cincinnati Bar Association to submit the names and addresses of witnesses interrogated by the Investigative Committee. However, subsequent cooperation has been excellent and most helpful. The jury recommends that the Committee of the Bar Association continue its investigation of alleged irregularities and immoral activities concerning certain employees of the Court.

Petitioner suggests (pet. pp. 15-16) that he was not furnished with a copy of the Board's findings. Written findings of the Board were made available to petitioner in ample time to permit him to file a brief in the Supreme Court of Ohio and to respond to the Board's conclusions and recommendations.

I.

PETITIONER HAS NOT BEEN DENIED PROCEDURAL DUE PROCESS, NOR HAS HE BEEN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, NOR HAS HE BEEN DEPRIVED OF HIS RIGHT TO COUNSEL.

Petitioner argues that since the Hearing Panel of the Board of Commissioners on Grievances and Discipline set up a schedule for filing briefs and then decided the matter without considering briefs, the petitioner was denied procedural due process and the effective assistance of counsel.

This contention ignores the well-defined procedure adopted by the Supreme Court of Ohio for the discipline of members of the bar in Rule XVIII (App. pp. A2-A19). The Board of Commissioners on Grievances and Discipline is a fact-finding arm of the Supreme Court of Ohio. It is not a lower court. It acts through Hearing Panels of three men each, which hear all of the evidence and then make recommendations to the entire Board. The Board, in turn, makes findings of fact and recommendations to the Supreme Court of Ohio but it is the Supreme Court of Ohio itself which decides, and only the Supreme Court which decides, whether an attorney at law should be subject to disciplinary procedures.

There is nothing in Rule XVIII which provides for the filing of briefs with the Board of Commissioners. More importantly, in this case the findings of fact and recommendations of the Hearing Panel were filed with the Board of Commissioners on August 4, 1972 and the brief of relator (respondent herein) was actually filed on August 9, 1972, five days after the Hearing Panel had made its findings of fact and recommendations. Therefore the Hearing Panel could not possibly have considered the brief of the respondent, Cincinnati Bar Association, in making its determination, so that the petitioner, George

S. Heitzler, Jr., could not have been prejudiced by the fact that the Cincinnati Bar Association filed a brief. The petitioner was not denied due process of law simply because he was not given the right to file a brief at a time prior to the time that the Board of Commissioners filed a certified report with the Supreme Court of Ohio. He had ample opportunity to file and did in fact file a brief with the Supreme Court of Ohio. He presented his arguments, through his counsel, at a full hearing before the Supreme Court of Ohio.

Insofar as procedural due process is concerned, in addition to the hearing before the Supreme Court of Ohio, petitioner was given notice of the charges against him by the respondent's complaint which was filed to initiate the proceedings. Petitioner was represented by counsel all through the hearing before the Hearing Panel and thereafter the Supreme Court of Ohio.

II.

THE FACT THAT GORDON SCHERER WAS A MEMBER OF THE BOARD OF COMMISSIONERS AND SAT IN ON THE DELIBERATIONS AND VOTING OF THE BOARD OF COMMISSIONERS HAD NO BEARING ON THIS CASE BECAUSE THE MINUTES OF THE BOARD OF COMMISSIONERS CLEARLY REFLECT THAT HE TOOK NO PART IN THE PROCEEDINGS.

It does appear that a member of the Board of Commissioners was a witness for the respondent, and that said member of the Board was present during the discussion and voting for a recommendation that the petitioner be indefinitely suspended from the practice of law. It is clear from the minutes that the witness-member took no part in either the discussions or the voting. The petitioner, in making an assertion that the petitioner's rights of due

process had been violated by the fact of this member's presence, makes the assumption that the other members of the panel present were intimidated by the witness-member's presence, and that their recommendation was changed as a result of his presence. This assumption is made by the petitioner with no evidence of any wrong-doing. It is submitted that such a claim serves no other purpose than to impugn the veracity and honesty of the Board of Commissioners.

Scherer was present but the minutes clearly indicate that he took no part in the decision or discussion in the Heitzler case. Scherer was properly present because other matters were discussed (pet. p. 31) and as a Commissioner, he had to give due consideration to those other matters. Petitioner argues (pet. p. 29) as follows:

> It is hard to believe, indeed impossible to imagine that the sole member of the Board of Commissioners from Hamilton County who had testified in an attempt to have Petitioner indicted, and who gave 40 pages of transcribed testimony before the Board of Commissioners in disciplinary proceedings seeking the removal of Petitioner from office sat stone faced, impartial and dispassionate through a 2½ hour meeting and never once gestured, indicated, or otherwise showed satisfaction or displeasure with the proceedings then in deliberation. It strains credulity to believe the other Board members could sit and impartially weigh what evidence they considered with Scherer present.

There is absolutely no evidence of what went on in the meeting although such evidence was surely available to petitioner, if such evidence existed, by a proper motion addressed to The Supreme Court of Ohio. There being no evidence, petitioner cannot draw an inference of impropriety on the part of Gordon Scherer or the Board of Commissioners. Such an inference would be pure speculation.

The law does not permit pure speculation and since the minutes of the meeting clearly stated that Mr. Scherer took no part in the proceedings, the law cannot permit petitioner's speculation of impropriety. See *Gedra* v. *Dallmer Co.*, 153 Oh. St. 258 (1950).

Petitioner makes the audacious statement in a footnote (pet. p. 30) that disciplinary procedures for lawyers and judges in the state of Ohio need to be reviewed by this court because, he says, that this court held over four years ago in *In Re Ruffalo*, 390 U.S. 544 that Ruffalo was denied due process, but that the Ohio Supreme Court has refused to reinstate him. The fact is that the *Ruffalo* case cited by petitioner, involved Ruffalo's disbarment in the federal courts (390 U.S. 544, 20 L.ed. 2nd 117 at 123). The state court proceedings were never the subject of orders by this court. To make such a careless statement not only impugns the integrity of the Supreme Court of Ohio but is obviously a deliberate attempt on the part of the petitioner to mislead this court.

The Supreme Court of Ohio, effective January 1, 1957, completely revised its disciplinary procedure. It adopted Rule XXVII, thereafter numerically changed to Rule XVIII, and thereafter to Gov. R. V. The procedure first adopted by the Supreme Court of Ohio on January 1, 1957 is the same procedure which was subsequently recommended for adoption in other states by the Clark Committee of the American Bar Association in June, 1970, 13 years after the Supreme Court of Ohio first adopted Rule XVIII. The recommendation of the Clark Committee has been substantially followed in at least 17 states and the District of Columbia. (A.B.A. Report of Special Committee on National Coordination of Disciplinary Enforcement, August, 1972).

Ohio's disciplinary procedures have been commended. (letter from The Hon. Tom C. Clark, App. p. 1).

III.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW, NOTICE AND AN OPPORTUNITY TO BE HEARD NOR WAS HE DENIED THE RIGHT TO COUNSEL BECAUSE HE WAS NOT GIVEN AN OPPORTUNITY TO ATTACK FINDINGS OF FACT AND RECOMMENDATIONS OF THE HEARING PANEL BEFORE THE BOARD FILED ITS FINDINGS WITH THE SUPREME COURT OF OHIO.

Respondent refers to Rule XVIII(15) of the Supreme Court of Ohio Rules which governed the proceedings in this case (App. p. A10). Under Rule XVIII(15) when the Board of Commissioners made a recommendation of indefinite suspension, the Board was required to make a final certified report of the proceedings including its findings and recommendations and to file it with the Clerk of the Supreme Court. Nowhere in the rules of procedure of the Supreme Court are there any provisions wherein the petitioner must be given the right to attack the findings of fact and recommendations of a hearing board prior to the filing of the recommendations with the Supreme Court of Ohio. It is at this juncture in the proceedings that the petitioner is given the opportunity to file his objections to the findings of fact. Petitioner was not denied due process of law because he was not given a right to file exceptions to, or attack the findings of fact and recommendations of the Hearing Panel prior to the time that the Board of Commissioners filed its certified report with the Supreme Court.

The Supreme Court of Ohio is the ultimate fact-finder in disciplinary cases.

Petitioner has contended throughout his Petition For a Writ of Certiorari that he was denied due process of law under the fourteenth amendment to the United States Constitution.

The record will reveal that petitioner was afforded, some

two years prior to the finalization of this matter, the opportunity to appear on two separate occasions before the Grievance Committee of the Cincinnati Bar Association and answer the then allegations pending against him. Subsequently, after an original complaint was filed, a Motion to Change Venue was granted petitioner in order to protect his rights insofar as local publicity might be detrimental to the rights of petitioner.

In the subsequent hearings in Dayton, Ohio, 50 witnesses appeared, 47 documents were introduced in hearings involving 6 days. 1408 pages of testimony were taken. Petitioner had ample opportunity to present any factual or procedural matter before the Hearing Panel.

In May, 1972, a subsequent hearing was held in regard to the Supplemental Complaint, which complaint has since been dismissed. Petitioner was further given the opportunity to raise procedural and factual questions at the hearing.

Further, petitioner was afforded the opportunity to file objections to the findings of the Board of Grievances before the Supreme Court of Ohio. He was then afforded an opportunity for oral argument, on the merits, before the Supreme Court of Ohio.

He has had a full opportunity to be heard and to present evidence at the appropriate administrative and judicial levels in Ohio and cannot now be heard to say that his due process rights, under the fourteenth amendment of the United States Constitution, were violated.

IV.

IT WAS PROPER FOR THE SUPREME COURT OF OHIO TO HAVE CONDUCTED THE DISCIPLINARY PROCEEDINGS AGAINST PETITIONER UNDER RULE XVIII DEALING WITH DISCIPLINARY PROCEDURE FOR ATTORNEYS RATHER THAN PURSUANT TO RULE XXI DEALING WITH THE RULE OF JUDGES.

Whereas the petitioner throughout his brief refers to "Gov. R. V" and "Gov. R. VI," as respondent pointed out before, the rule in effect at the time the complaint against the petitioner was filed was Rule XVIII and the corresponding rule concerning the discipline of judges was Rule XXI. While respondent does not wish to be confusing on this point, it is petitioner who is confusing by referring to rules which were not in effect at the time these proceedings were brought.

In this case, the Cincinnati Bar Association's complaint was filed under "Rule XVIII and/or XXI of The Supreme Court of Ohio." (pet. App. p. A-1). Thereafter, petitioner filed an answer, respondent filed a supplemental complaint, and petitioner filed an answer to the supplemental complaint (pet. App. p. A-14), wherein he stated:

> 1. Respondent admits that through his counsel by invitation, he did confer with John J. Getgey on August 16, 1971, and during the course of said conversation through counsel, did suggest that all interests were best served in the disposition of this cause if proceedings were governed by Rule XVIII.

No objections were made by petitioner's counsel (respondent below) to proceeding under Rule XVIII at the time of the hearing before the Hearing Panel (pet. App. p. A-19 and A-41). The Board of Commissioners, who heard all of the facts in the original complaint against petitioner, indicated in their findings of facts as follows:

> The original Complaint was submitted in the alternative under Rule XVIII and Rule XXI of the Rules of the Supreme Court of Ohio. The Supplemental Complaint did not specify under which Rule it was submitted. Both matters were heard as a Complaint and Supplemental Complaint under Rule XVIII. *No objections were made by counsel for Respondent to the matters being so heard.* (Emphasis added)

Having raised no objection below, indeed having encouraged it, petitioner cannot now be heard to complain that the Supreme Court of Ohio acted improperly in disciplining petitioner as an attorney under Rule XVIII.

Petitioner refers to Ohio Revised Code § 2701.11 and § 2701.12 which deal with the removal of judges and says that they are the sole exclusive and jurisdictional provisions for the removal of judges and that, therefore, any other proceedings are void.

These statutes were passed by the legislature of the state of Ohio in 1965. Subsequent to that time the voters of the state of Ohio adopted an amendment to Article IV, Section 2 of the Constitution of the State of Ohio effective May 7, 1968, quoted in this brief on page 1. This gave the Supreme Court of Ohio original jurisdiction in the discipline of all persons admitted to the practice of law in Ohio and all other matters relating to the practice of law. Petitioner was a lawyer as well as judge. The Supreme Court of Ohio chose to proceed, as it was empowered to do by the Constitution of the State of Ohio, under Rule XVIII and discipline petitioner as a lawyer.

The Supreme Court of Ohio has very properly held in the case of *Mahoning County Bar Association* v. *Franko*, 168 Oh. St. 17 that attorneys who are judges must maintain their status as attorneys. It has been long the rule that when an attorney seeks the office of judge and becomes bound by the high professional standards imposed by the judicial canons he can lose his license to practice as an attorney by violating a judicial canon, because by becoming a judge he does not stop being an attorney.

It is respectfully submitted that Ohio Revised Code § 2701.11 and § 2701.12 which were adopted prior to the constitutional amendment amending Article IV, Section 2 of the Constitution of the State of Ohio in 1968 cannot

interfere with the Supreme Court of Ohio's right to discipline members of the legal profession.

Where both parties have appeared in a case and participated in it neither party can thereafter question jurisdiction. *Forsyth* v. *Hammond*, 166 U.S. 506.

V.

THE FACT THAT THREE MEMBERS OF THE BOARD OF COMMISSIONERS IN THE INSTANT CASE SAT AS A HEARING PANEL IN A COMPANION CASE INVOLVING DIFFERENT DISCIPLINARY CHARGES HAS NO BEARING WHATSOEVER UPON THE PETITIONER'S RIGHTS IN THIS CASE.

It appears to be the petitioner's contention that since three members of the duly constituted Board of Commissioners on Grievances and Discipline had heard a second group of charges against the same petitioner, those three members should not have been permitted to have taken part in the proceedings of the Board of Commissioners. The petitioner makes this bald assertion with absolutely no evidence that his rights were prejudiced during the course of this hearing. Respondent must, therefore, assume that petitioner contends that the mere fact that the three members were present at the hearing and voted for the recommendation in and of itself prejudiced the rights of the respondent. Respondent believes that this contention is totally without merit. Without the votes of these three members, the decision would still have been unanimous. Petitioner must, therefore, assume that the matters contained in the second charge, namely, his manipulation of trust funds and a failure to report certain assets for inheritance tax purposes was fully discussed before the Board prior to the recommendation. This panel is made up of respected members of the Bar of Ohio, care-

fully selected by the Supreme Court of Ohio. To make such an assumption is totally unwarranted.

Petitioner's argument is an absurdity. Logically applied, it would prevent the Board itself from considering a case involving a lawyer who had been previously disciplined or even charged. In fact, even the Supreme Court of Ohio itself would be precluded from hearing a case if the same lawyer had been previously before it on a disciplinary charge. The Board members are not jurors: they are acting as an arm of the Supreme Court of Ohio itself.

VI.

THE HOLDING OF THE SUPREME COURT OF OHIO THAT PETITIONER LEFT THE APPEARANCE OF UNLAWFUL COHABITATION WITH CAROL CHASTEEN IN VIOLATION OF CANON 4 OF THE CANONS OF JUDICIAL ETHICS IS SUBSTANTIATED AND IS NOT VIOLATIVE OF DUE PROCESS.

Petitioner's argument on this point is simply one of the weight of the evidence.

Respondent submits that the following facts amply support the findings of the Supreme Court of Ohio in this regard.

During the time specified in the complaint, Judge Heitzler lived at 2697 Erlene Drive, Cincinnati, Ohio, a complex of apartment buildings consisting of separate buildings, each of which contained 12 apartments. T. 13. He lived there from approximately the first of 1969, T. 14, until April 1, 1971, T. 13. Judge Heitzler was formerly married to Ruthe Heitzler, from whom he was divorced on October 12, 1970, T. 15. He was married to Carol Chasteen on November 14, 1970 at Newport, Kentucky, T. 15. Since the first of 1969 up until the time of his divorce, Judge Heitzler was separated from his first wife, Ruthe Heitzler, T. 16. He had first met Miss Chasteen in the latter part of

1968 while she was employed as a waitress at the Playboy Club, T. 17. According to Judge Heitzler she gave him assistance in taking care of his son, the services being rendered in Judge Heitzler's apartment, T. 17-18. Although Judge Heitzler testified that he paid Miss Chasteen for the services rendered to his son in administering medication, he did not take any income tax deductions for those services, nor did he file, with the federal government, a Form 1099, nor did he make any payment on account of Social Security for Miss Chasteen, T. 21-22. Miss Chasteen was in Judge Heitzler's apartment early in the morning, during the day, during the evening, T. 37. Although Judge Heitzler gave a statement to the Bar Association, upon his own request, in September, 1970 concerning his alleged misconduct, he did not mention at that time that Miss Chasteen acted as his son's nurse, T. 1387.

Charles Wurster, who was Judge Heitzler's landlord in the apartment on Erlene Drive, who was called as a witness on behalf of the petitioner, testified, T. 1020, that he saw Carol Chasteen go into the apartment and not come out and that sometimes he saw her coming out when he hadn't seen her going in shortly before.

Gabriella Bode testified that she thought that Carol Chasteen lived there, T. 380, and that she had seen Carol Chasteen carrying in groceries, T. 319-392.

Nick Greco testified, T. 566, that he lived at 2695 Erlene Drive in the apartment complex for about two years; that Judge Heitzler lived next door, that he saw Carol Chasteen leaving and entering the building with Judge Heitzler; and in the morning when he would go to work on several occasions he saw her on the patio of Judge Heitzler's apartment shaking out throw rugs with her robe on at appromimately 7:30 in the morning, T. 567. He thought that Carol Chasteen was living in the apartment with Judge Heitzler, T. 568.

The general reputation of the Erlene Drive complex was questionable. Mr. Wurster, the landlord, testified that he received a rental application from a Gabriella M. Greco; that he later found out that a Gabriella Greco and Gabriella Bode were one and the same person, T. 1024; that she lived in the partment after Vince Greco moved out, T. 1025; that later on Vince and Mary Ellen, presumably, Greco, moved into the same building, T. 1034; that if a couple came into rent an apartment and said they were man and wife that is all he was interested in, T. 1035; that when Vince came in with Mary Ellen the fact that Gabriella had been living there first as Vince's wife didn't bother him, although it did bring up a question in his mind, T. 1035; that so long as Gabriella paid the rent he didn't ask any questions, T. 1036.

Mr. Wurster also testified that he saw Carol Chasteen leave the apartment in the morning about 7:30—8:00 A.M., T. 1029. Mr. Wurster left no doubt that if Carol Chasteen were on the balcony of Judge Heitzler's apartment shaking out a rug it would be no problem seeing her from across the driveway, T. 1038.

On the question about how many unmarried couples were living in the Erlene Drive complex, Mr. Wurster testified, T. 1043, as follows:

> "A. I don't know. I don't have the contracts with me.
>
> "Q. And you don't check on that sort of thing?
>
> "A. Not if they are married or not. All we check on is their jobs . . . ."

At least two people, Mrs. Bode and Mr. Greco thought that Carol Chasteen was living there with George Heitzler. Judge Heitzler admitted that she was there at all hours, T. 37.

The Supreme Court of Ohio did not believe that Judge Heitzler retained the services of a Playboy Bunny simply

to give medicine to a sick child. The Supreme Court of Ohio believed that the action of Judge Heitzler, a married man, living in an apartment, inhabited, to some extent, by unmarried couples, and having a former Playboy Bunny in his apartment at all hours of the day and night gave the appearance of impropriety.

Canon 4 provides that a judge's personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach. Canon 34 provides that in every particular a judge's conduct should be above reproach.

The Supreme Court of Ohio found that in his personal living habits, while married to Ruthe Heitzler, and while either living with Carol Chasteen on Erlene Drive or giving the appearance that he was living with Carol Chasteen on Erlene Drive, Judge Heitzler was not conducting himself so as to be above reproach. There was ample evidence on which to base this finding.

VII.

THE DECISION OF THE SUPREME COURT OF OHIO IN REFERENCE TO PETITIONER'S ASSOCIATION WITH HARMONY LOAN COMPANY IS FULLY JUSTIFIED AND PETITIONER'S CONDUCT IN THAT REGARD VIOLATED CANONS 13, 25, 33, AND 34.

Petitioner says that he presented uncontradictory evidence by affidavits which are now part of the record in this case, denying any knowledge of the use of his name in any prospectus put out by Harmony Loan Company.

The reason that the affidavits are uncontradicted is that the respondent at no time had the opportunity to contradict them.

The fact is that petitioner, who objects violently that he was denied due process, does not seem to want to obey

the most elementary rules of evidence. At no time during the hearing before the Hearing Panel in this case, which consumed six days, did the petitioner deny any knowledge of the use of his name in any prospectus, nor did the vice president of Harmony Loan, Mr. Spampinato, who testified at the hearing at length, testify that Judge Heitzler had no knowledge of the use of his name.

Petitioner seems to believe that he can ignore elementary rules of evidence and hearing procedures; completely fail to adduce any probative evidence at the hearing; and then, by filing affidavits attached to a motion to quash, get evidence into the record.

Such is not the case.

The facts on Judge Heitzler's connection with Harmony Loan and the facts of his giving the impression of favoritism are as follows:

Judge Heitzler was a Director of Harmony Loan Company, a Kentucky corporation, from 1964 to August, 1971, T. 28. Harmony Loan was a small loan company, not a savings and loan association as suggested by petitioner. Judge Heitzler invested $30,000 in it, $20,000 being his own money, $5,000 belonging to his son, Geoffrey and $5,000 belonging to Carol Chasteen, T. 29. His investments in Harmony Loan, in detail, were as follows, T. 30-31:

Date	*Investment*	*Dollar Amount*
December 22, 1964	20 full paid non-assessable preferred shares	$2,000.00
January 27, 1966	50 full paid non-assessable preferred shares	5,000.00
April 29, 1966	50 shares full paid non-assessable preferred	5,000.00

Date	*Investment*	*Dollar Amount*
April 29, 1966	Five-year debentures	5,000.00
February 26, 1970	Ten-year seven percent debentures	5,000.00
March 27, 1970	Ten-year seven percent debentures	5,000.00
April 27, 1970	Five-year seven percent debentures	3,000.00

Judge Heitzler, Geoffrey Heitzler and Carol Chasteen were all non-residents of Kentucky, T. 31, 32. Ex. 4, 5 and 6 being the Harmony Loan Prospectuses all state that sale is limited to residents of the State of Kentucky. Nevertheless, respondent, contrary to the allegations of the complaint, has been unable to determine any Kentucky statutory law prohibiting the sale of securities to nonresidents of the State of Kentucky. From the fact that the sale was limited by the prospectuses, we can presume that it is contrary to a filing with the Kentucky Division of Securities. It is also against the law of the State of Ohio to sell securities not registered in the State of Ohio to Ohio residents (Section 1707.07 O.R.C.).

Judge Heitzler's investments in Harmony Loan are undisputed and are set forth above. As stated above, he was a Director from 1964 until August, 1971. His name appears as a Director in the prospectuses, Ex. 4, 5, and 6. He is prominently featured in a brochure which was distributed by management of Harmony Loan, Ex. 7. Ex. 7 contains his picture and the fact that he is a judge. Mr. Mathews, who was the president of Harmony Loan testified that Ex. 7 was a brochure which Harmony Loan paid to have prepared, T. 467, that it was mailed to people, and that it was made available to customers of Harmony Loan who could

pick copies of Ex. 7 up, T. 468. Brochures similar to Ex. 7 were "lying all over the place," T. 468.

Si Cornell, who testified as a witness for the petitioner, said he knew that Judge Heitzler was associated with Harmony Loan and thought it was a building and loan company. When told that it was a small loan company, he said oh well, there are "good loan sharks and bad loan sharks," T. 1341. The use of the word "sharks" is relevant. It reflects a public image.

George C. Young, president of the Cincinnati Better Business Bureau, testified that Harmony Loan had a poor reputation in the community, T. 562. Mr. Young, as president of an organization constantly receiving complaints from people is certainly in a position to know.

Who were the principals of Harmony Loan Company, upon whose Board of Directors Judge Heitzler sat for nearly seven years?

Mr. James Mathews was the President and Director for about ten years. He and Mrs. Mathews and Frank Spampinato and Mrs. Spampinato owned all of the Class A voting stock, T. 456.

What kind of a businessman was Mr. Mathews?

He signed Ex. 4, a prospectus, as a result of a registration statement which had been filed. On Ex. 4 he lists his address as 180 Fourth Street, Silver Grove, Kentucky, but he never lived there, T. 463-464. The same exhibit lists Judge Heitzler's address as 1708 Llanfair Avenue, Cincinnati, Ohio. Nevertheless, Judge Heitzler testified that he hadn't lived at that address since the first of 1969, T. 14. The prospectus, Ex. 4, says that Judge Heitzler had been a judge of the Domestic Relations Court for five years prior to the date of its issue, T. 465, Ex. 4. Nevertheless, Judge Heitzler was elected to the Domestic Relations Bench for the first time in 1968 and assumed office in January, 1969, T. 7.

Harmony Loan Company was run by an executive committee consisting largely of Mr. Spampinato and Mr. Mathews, T. 480. Judge Heitzler came only to one or two meetings of the directors in seven years, T. 480. One may ask, at this point, why Judge Heitzler would consent to be a Director of an organization whose meetings he did not attend, about which he knew nothing, and yet which he must have known used his name for promotional purposes.

Harmony Loan received a cease and desist order from the Division of Securities of the State of Ohio for selling its securities in Ohio contrary to the laws of Ohio, T. 485, Ex. 33. It appears that certain letters went out over the signature of James Mathews soliciting investments of Ohio residents, one of which is in evidence as Ex. 27, T. 486. Harmany Loan Company received a 15-day selling suspension in Kentucky in 1970, T. 503.

Mr. Spampinato was in the furniture business and used car business with Mr. Mathews and he quite honestly testified that these businesses were "feeders" to Harmony Loan, T. 725. In fact, Mr. Mathews and Mr. Spampinato had a little feeder empire going of discount-type furniture stores, used cars, and insurance, T. 469-478. Twenty-five to thirty percent of the Harmony Loan Company business came from these other Mathews and Spampinato interests, T. 510.

Mr. Spampinato testified that there was a "paper" Board of Directors of seven which had maybe two meetings in five or six, or seven years, T. 718. Mr. Mathews testified, on the other hand, that the Board had regular quarterly meetings, T. 480. Mr. Spampinato said that he and Mr. Mathews made the big decisions and ran the business by themselves.

Mr. Spampinato hit the nail on the head, T. 719, when he said that it was an honor to have these dignitaries like Judge Heitzler on the Board. It was good advertising as well as being an honor.

Although Mr. Mathews could not remember anything about the address at 180 Fourth Street, Silver Grove, and he didn't know what was there, Spampinato remembered it. He testified that Mr. Mathews had lived over there at one time when he had had a spat with his wife, T. 727.

Mr. Spampinato was aware of the 1965 cease and desist order against Harmony Loan. He also was aware of the suspension in 1970. He also testified that at the time he and Mr. Mathews purchased their interests in Harmony Loan they were also residents of Ohio and not of Kentucky, T. 764-765.

Mr. Spampinato was in the used car business, T. 722. Not that there is anything wrong with the used car business, but it at least makes one pose the question about why a judge, first of the Municipal Court and then of the Domestic Relations Court, should become closely and publicly associated with people in the discount furniture, used car, and small loan business. The public image of a used car dealer is not good. The public image was aptly stated, indirectly, but nonetheless meaningfully by petitioner's witness, Si Cornell, who testified as follows, T. 1341-1342:

> "Q. What about the general concept of the reputation of a used car dealer?
>
> "A. Well, I knew a railroad man called Honest John because he never had stolen a boxcar.
>
> "Mr. Goodman: Thank you. That is all I have."

Si Cornell, having been qualified as an expert on reputations by petitioner's counsel, T. 1327, 1328, testified as to the reputations in the community of Mr. Mathews and Mr. Spampinato as follows, T. 1346-1347:

> "Q. Now, you mentioned something that you were acquainted with some of the other members of the Board of Directors of Harmony Loan.
>
> "A. I just know them. In other words, I have met them.

"Q. You knew of their reputations?

"A. Yes.

"Q. The indications was that their reputation didn't enjoy the high level in your mind that Judge Heitzler? (Sic.)

"A. No. I most certainly would not say that Mathews and Spampinato, in my mind, at least, are not on a par, reputable par with Judge Heitzler, no.

"Q. Would it be good judgment or poor judgment, then, for Judge Heitzler to knowingly associate himself in a business status with such people?

"A. Well, from the standpoint of social scene, perhaps not. However, the business was operating beyond the jurisdiction of his court and I don't see where there would be any conflict. The business was even in a separate state. He had absolutely no legal standing any time he crosses that bridge. He is just one more citizen as far as Kentucky is concerned and a transient at that."

The brochure, Ex. 7, also contained pictures of Joseph Becker and Robert Stone. Joseph Becker is Judge Heitzler's bailiff. Robert Stone is a lawyer-optometrist who appears with some frequency before Judge Heitzler. Ralph Crisci, who is Chief Referee in Domestic Relations Court, was at one time an officer of Harmony Loan and acted as its attorney. All of these people have dined in public places with Judge Heitzler. Mr. Crisci and Mr. and Mrs. Stone accompanied Judge Heitzler to Majorca. They were in the same "group." Judge Heitzler and Mr. Stone have also traveled together on other occasions.

It is obvious that Judge Heitzler was, to an extent, under the influence of cronyism when he served as a member of the Board of Directors of Harmony Loan Company. Relator has alleged that Judge Heitzler's actions with respect to Harmony Loan Company and its personnel are in violation of Judicial Canons 13, 25, 33 and 34. Canon 13 reads in part that a judge "should not suffer his conduct to justify

the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person."

Canon 25 reads in its entirety:

"25. Business Promotions and Solicitations for Charity.

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of this office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, or use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

It would be difficult to fathom a more direct violation of Canon 25 that Judge Heitzler's conduct in regard to Harmony Loan Company.

Judge Heitzler testified, T. 35-36, that for about a year and one half he had lunch regularly at a place called the Hangar, a public restaurant in downtown Cincinnati with a group including Dr. Stone. Dr. Stone is an attorney, T. 1194, and an optometrist, T. 1195. He had been a friend of Judge Heitzler for a considerable period of time, T. 1201. It was this intimacy and friendship which lead a female bartender in the Side Door Cafe named Betty, to recommend to Stanton Matlock, Dr. Stone as an attorney who could get someplace with Judge Heitzler after Matlock had been frustrated over several years in a stalled divorce case, T. 180-187.

The Canons which petitioner is charged with having violated go beyond moral turpitude. In fact, this argument and petitioner's arguments VIII and IX prove that petitioner misconceives the position of a judge. Petitioner was not charged with the violation of a specific criminal statute or statutes, but of Canons designed to require the highest standard of conduct from one who serves as a judge and lawyer. One of the most important aspects of a court is the respect which it commands from the citizens. If a court does not command respect, its effectiveness is diminished and the rule of law itself becomes eroded. It is for this reason that judges should not only avoid impropriety itself but the appearance of impropriety. A lawyer is not compelled to be a judge. He accepts the office voluntarily together with all of the high responsibilities which they entail and he should not be heard to complain of the violation of constitutional rights simply because he has been charged with violating higher standards of conduct than would apply to the ordinary citizen.

VIII.

JUDGE HEITZLER WHILE A JUDGE OF THE MUNICIPAL COURT AND A DIRECTOR OF HARMONY LOAN CO. SIGNED NUMEROUS ORDERS WHEREIN HARMONY LOAN COMPANY WAS A PARTY, AND SUCH CONDUCT VIOLATED CANONS 4, 13, 25, 26, 29 AND 34 OF THE CANONS OF JUDICIAL ETHICS.

Mr. Daniel Feldhaus, Clerk of Hamilton County Municipal Court, made a tabulation and summary of the cases in which Harmony Loan Company was a party wherein Judge Heitzler, as Judge of the Municipal Court, participated, T. 665-667. The exhibit that he prepared is Ex. 12 which lists 357 cases wherein Harmony Loan Company was a party in which Judge Heitzler signed 487 orders while he was a Judge of the Municipal Court.

Judge Heitzler testified as follows, T. 37:

> "Now, while you were a Director of Harmony Loan Company and while you had an investment in Harmony Loan Company did you ever hear as a Judge any cases in which Harmony Loan Company was a party plaintiff?
>
> "A. Yes, sir."

The nature of these cases were described by Judge Heitzler, upon examination by his own counsel, T. 68, as follows:

> "A. ——default judgments, the granting of confessed judgments, the setting aside of default judgments, garnishments, the ordering of money paid in to Court on garnishments—that is when a lawyer withholds the money and the Judge has to sign an order ordering the money paid in to Court—continuances and dismissals.
>
> "Q. Judge, specifically, did you ever participate as a judge in any contested case while you sat on Municipal Court in which Harmony Loan Company was a party?
>
> "A. Not to my knowledge, I did not, and I will say no, I did not, sir."

Whether the Judge participated in a contested case is of little import insofar as the Canons of Judicial Ethics are concerned. Canon 25 has been quoted above. Canon 29, which was added to Count 9 by motion to amend, T. 1398, reads as follows:

> "29. Self-Interest.
>
> "A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account but he should, of course, refrain from *any judicial act* in such controversy." (Emphasis added.)

Canon 29 refers to *any* judicial act. A director of a corporation, as well as an officer of a corporation, is a party to any proceeding for purposes of the cross-examination rule and for other purposes. A corporation can only speak through its Board of Directors and its officers. It is respondent's position that when Harmony Loan Company was a party in the court, Judge Heitzler as a Director of Harmony Loan and as a substantial investor had "personal litigation" within the broad meaning of the second sentence of Canon 29.

Also involved is Canon 26, the first paragraph of which reads as follows:

> "26. Personal Investments and Relations.
>
> "A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties."

Judge Heitzler retained his personal investments in Harmony Loan Company while he was a Judge of the Municipal Court, which was frequently a party to litigation before him.

Although the Judge makes much of the fact that he heard no contested cases to his knowledge, this is disputed by a practicing attorney, Arthur Schuh, who, although his memory is admittedly vague, testified positively that he tried a case before Judge Heitzler in Room A. of the Municipal Court wherein Harmony Loan, represented by Schuh, was a plaintiff, T. 339. Judge Heitzler made no dis-

closure of his personal interest in Harmony Loan, T. 341. Although Schuh was collection attorney for Harmony Loan Company for at least four years, from 1963 to 1967, he did not know that Judge Heitzler had a personal interest in it, T. 344.

Richard Rawe, City Editor for the Post-Times Star, who made a study of the Domestic Relations Court situation, testified that Judge Heitzler ruled more than 120 times in cases wherein Harmony Loan Company was involved, T. 683. Gerald White, a reporter for the Cincinnati Enquirer, gave testimony to the same effect, T. 778-780. The fact that Judge Heitzler was a Director of Harmony Loan Company and that he acted in a judicial capacity in cases involving Harmony Loan Company was certainly known by these gentlemen, two members of the public.

Although Judge Heitzler testified that he does not recall hearing any contested case in which Harmony Loan Company was a party, on redirect examination he testified that he probably heard a motion in the case of *Harmony Loan Company* v. *Williams*, which was a motion to stay the proceedings, T. 85, and that he signed an entry overruling a motion to quash and granted defendant ten days to plead in another case involving Harmony Loan Company, T. 86.

The fact that violations of canons occurred before petitioner was elected to the Common Pleas bench does not mitigate against the violations. An attorney upon election to one judicial position and subsequent election to another does not cease to be a member of the legal profession, and must be held accountable for all violations of the canons no matter in what term of office they occurred.

Both Rule XVIII and the Canons of Judicial Ethics contain express provisions indicating their applicability to petitioner because he is a member of the legal profession: not because of the elective process of his judicial position. In 1954, the Supreme Court adopted the Canons of Judicial

Ethics and declared that the Canons were binding upon "all members admitted to practice law in the state of Ohio . . ." (See Rule XVIII, Rules of Practice of the Supreme Court of Ohio [1959].) The procedure for applying the Canons is currently found in Rule XVIII, which contains a preamble linking the procedure to the Supreme Court's power over the bar of Ohio. The jurisdiction of the Board of Commissioners created under Rule XVIII, Sections 1, 2, the definition of misconduct, Section 5(a), and the methods of discipline, Section 6, expressly apply to members of the Bar of Ohio who become judges. For example, misconduct is defined as any violation of the Canons of Judicial Ethics and the methods of discipline, are applicable to any attorney "or judge found guilty of misconduct," Section 6. (App. p. A5.)

For purposes of the disciplinary power of the Supreme Court of Ohio over a judge under Rule XVIII, the incident of the judge's membership in the bar of Ohio is separated from the judge's position as an elected official. The manner and effect of discipline under Rule XVIII is expressly attached to the judge's privilege to practice law in Ohio.

None of the cases cited by the petitioner deny the Ohio Supreme Court's power to discipline a judge as a member of the bar through disbarment or suspension from practice. Both the *Stokes* (22 Oh. St. 2d 120) and *McMillen* (123 Oh. St. 212) cases relate to the separate question of the removal of any publicly elected official, including a judge, from his office. *Stokes* involved a complaint filed by electors against a mayor under a general removal statute (Ohio Rev. Code Ann. § 733.72 (c) [1953]) which applied to any misfeasance of malfeasance committed by any officer of a Municipal Corporation while in office. Similarly, *McMillen* concerned a removal action against a judge under a general removal statute (Ohio Gen. Code § 10-1, now Ohio Rev. Code Ann. § 3.07 [1953]) applicable to certain types

of misconduct by any person holding office in the state, county, or municipality. The *McMillen* case was an action against a judge but the judge's privilege to practice law, his membership in the bar, and the disciplinary power of the Supreme Court over members of the bar were not in issue.

Ohio case law, including the *Stokes* and *McMillen* cases cited by petitioner, does not insulate an elected public official, including a judge, from removal from office for misconduct during a prior term of office. A re-election does not *ipso facto* toll the operation of removal statutes. The question of whether an elected official can be removed from office for misconduct during a prior term is "essentially one of legislative intent" manifest in the applicable removal statute. (*Stokes*, *supra* at 123.)

Petitioner during his prior term of judicial office did not cease to be a member of the legal profession of Ohio. *Mahoning County Bar Association* v. *Franko*, 168 Ohio St. 17 (1958). As a member of the bar, he continued to be subject to the disciplinary power of the Supreme Court under Rule XVIII which includes disbarment or suspension from the practice of law for violation of the Canons of Judicial Ethics. Rule XVIII, Section 5. (App. p. A5.)

The opinions of the Ohio Supreme Court in both *Stokes* and *McMillen* cited by the petitioner are consistent with this conclusion. In both cases, the causes for removal were based upon misconduct in prior terms of office. Removal was denied because the removal statutes involved in those cases did not set forth misconduct in a prior term as a ground for removal and the past misconduct did not carry over to the public officials' present terms of office.

In *McMillen*, the action against a Common Pleas Judge was based upon a removal statute (Ohio Gen. Code § 10-1, now Ohio Rev. Code § 3.07 [1953]) authorizing removal of a public official for "misconduct in office." The judge was

charged with misconduct involving moral turpitude in that he borrowed money from lawyers who practiced before him, and discriminated in favor of these lawyers in the disposition of legal matters. All the borrowing transactions had taken place during prior terms of judicial office and none of the debts owing to lawyers had been incurred since the date of the beginning of the judge's present term of office. The court noted that had these obligations been fully paid prior to the judge's present term of office, these transactions would not constitute a cause for removal. The court's position, although dicta, was consistent with the reuirement of the statute that the misconduct be "in office," which, by virtue of the penal character of the statute referred to the present term of office. (See e.g., *State ex rel. Stokes* v. *Probate Court*, 22 Ohio St. 2d 120, 124 [1970].) With regard to the debts that had not been paid by the beginning of the judge's present term, there were factual findings negating discrimination by the judge in his present term as a result of these debts. Since the showing of discrimination was an element of removal for misconduct involving moral turpitude, and the Supreme Court was disinclined to reject the factual findings on this issue, removal was denied.

The removal statute in *Stokes*, *supra* (Ohio Rev. Code, § 733.72 [1953]) contains the same limitation on the causes of removal as the statute in *McMillen*. An action was filed in a Probate Court against a mayor under a statute permitting removal from office for "malfeasance and misfeasance in office." The mayor challenged the jurisdiction of the Probate Court over the subject matter of the claim. Subsequent to the filing of an appeal to the Ohio Supreme Court from an adverse ruling on the jurisdictional question—but before decision by the court—the mayor was reelected at a regular municipal election on November 4, 1969. As a result of the re-election, all the alleged mis-

conduct occurred in a prior term; consequently, the court held, "the issue (of removal) presented to Probate Court is now moot." (*Stokes, supra* at 124.) Consistent with the *McMillen* rationale, the court in *Stokes* interpreted the "in office" qualification of misfeasance or malfeasance as causes for removal to refer to the present term of office, that is, the term from which removal was sought.

The critical distinction, therefore, between the Heitzler case and *McMillen* or *Stokes* cases is the legislative intent manifest in the applicable removal statute with regard to misconduct in a prior term as a cause for removal. The court in *Stokes* said that the denial of removal turned on "the absence of clear legislative language making conduct in prior terms a ground for removal from office under this section." *Stokes, supra* at 124.

IX.

THE HIRING BY PETITIONER OF A CONVICTED FELON AS AN EMPLOYEE OF THE COURT, WITHOUT REGARD TO HIS ABILITY, BUT BEING MOTIVATED SOLEY BY POLITICAL CONSIDERATIONS, CONSTITUTED A VIOLATION OF JUDICIAL CANON 12.

It is the height of impertinence on the part of petitioner's counsel to seek to make part of the record in this case by a motion to quash filed in the Supreme Court of Ohio the affidavit of Rufus "Snowshoe" Smith as to why he took the Fifth Amendment when called to testify at the hearing before the panel and the affidavit of his alleged attorney as to why Rufus "Snowshoe" Smith took the Fifth Amendment. The fact is that Rufus "Snowshoe" Smith took the Fifth Amendment at the hearing before the Hearing Panel and refused to testify, thus denying the Hearing Panel and this Court either the benefit, or the handicap, of his testimony as the case may be.

All of the erudite articles about rehabilitation of criminals which the petitioner cites in his brief; all of the lofty idealism which petitioner now flouts in the faces of this Court are totally destroyed by a simple examination of the record and the real reasons behind the hiring of Rufus "Snowshoe" Smith. Rufus "Snowshoe" Smith was not hired because of Judge Heitzler's lofty idealism in attempting to rehabilitate a criminal. He was hired for political reasons. While criminal rehabilitation is a lofty ideal, you don't make a security guard at Tiffany's out of a jewel thief anymore than you would put rabbits out to guard the lettuce.

The facts in this entire sordid episode are as follows:

Rufus "Snowshoe" Smith worked on Judge Heitzler's campaign, T. 37-38. Shortly after he became Domestic Relations Judge on January 5, 1969, Judge Heitzler hired Rufus "Snowshoe" Smith as a Constable, T. 38-39. The duties of a constable were to schedule cases before referees, to "pull folders" and to escort litigants.

At the time he was employed, Rufus "Snowshoe" Smith had a lengthy criminal record, T. 46, 70, 80-81. Judge Heitzler was familiar with the fact that he got the nickname "Snowshoe" following a burglary because the police were able to track him through the snow, T. 1392. Richard Spencer, the custodian of the records of the Cincinnati Police Department, identified the exhibits pertaining to Rufus "Snowshoe" Smith, Ex. 17-17B, inclusive. Mr. Spencer testified, T. 347, that the arrest record of Rufus "Snowshoe" Smith showed 50 arrests, Ex. 13. On the Cincinnati rap sheet, Ex. 14, there were 16 serious offenses listed, T. 349. Ex. 15, the felon registration, reflects Rufus "Snowshoe" Smith's periods of incarceration. He was incarcerated in the Ohio Penitentiary on the charge of burglary, T. 349-350. Ex. 16 is the FBI rap sheet which

lists crimes committed outside Cincinnati, T. 350-352. Mr. Spencer made positive identification of Rufus "Snowshoe" Smith through his photograph, Ex. 17-A. These records were available to Judge Heitzler, T. 354.

Two witnesses testified that Rufus "Snowshoe" Smith either bribed or attempted to bride them, Howard Wunker (whose name is consistently misspelled in the transcript as "Wonker"), and Reuben Richardson. Mr. Wunker testified that Rufus Smith offered to help him to get his daughter's children returned to her for $4,000.00, T. 521, and then Rufus "Snowshoe" Smith later reduced this figure to $250.00, T. 522. Dr. Richardson testified that Rufus offered to see that his, Dr. Richardson's, divorce "came out alright" for $1,000.00 and Dr. Richardson gave Rufus $1,000.00, T. 411. He testified that Rufus "Snowshoe" Smith was familiar with Dr. Richardson's divorce file and on one occasion brought the file out to Dr. Richardson's house, T. 415.

Dr. Richardson is a licensed, practicing physician and it is difficult to imagine why he would lie about a charge that could involve criminal prosecution against himself on a bribery charge.

It is obvious that the Hearing Panel, which heard the testimony and observed the witnesses, believed Dr. Richardson and Mr. Wunker and did not believe Mr. and Mrs. Atkins. The findings of the Hamilton County Grand Jury were not before the panel and are indeed no part of this case as petitioner well knows. Nor are the affidavits of Wilbert E. Stagenhorst, attached as petitioner's Exhibit 6 to petitioner's motion to quash and dismiss any part of the record in this case.

The fact is that Rufus "Snowshoe" Smith had access to files and used them in his attempted bribes of at least two litigants in the court.

Respondent assumes that petitioner will vouch for the credibility of his own witnesses. One of such witnesses was Si Cornell who was questioned by Mr. Henry, a member of the panel, T. 1343, 1344, as follows:

> "A. Rufus took to drinking pretty bad and he kept wanting me to write stories about how great a fellow Rufus was and I didn't think that was very truthful so I didn't write them.
>
> "Q. But well prior to the newspaper articles I take it you knew Rufus was there?
>
> "A. Yes.
>
> "Q. And you knew of his record?
>
> "A. Yes, I knew he was there. I assumed that he was there for political reasons and that were good and sufficient. In other words, the way it came to me, apparently Rufus claimed to have or possibly even did have some kind of sway in the colored community and thought that the fact that he was employed, well, blackmail, almost, 'Higher (Hire) me or you will have trouble.' You follow me? [Sic.]
>
> "Mr. Henry: Thank you. That is what I understand the whole thing to be. 'If you don't want another riot, Baby, get me a job.' "

He was further questioned by Mr. Bridgewater, another member of the panel, T. 1344, as follows:

> "By Mr. Bridgewater:
>
> "Q. Do you believe that Rufus was fully capable of making such threats, whether he could implement them or not?
>
> "A. I believe he is thoroughly capable of making them. Whether he had any actual influence with the colored community, I have no idea."

Si Cornell, petitioner's witness, testified, T. 1338, that he thought that Rufus "Snowshoe" Smith was mentally deficient, that Rufus "Snowshoe" Smith was "obviously a walking case of trouble." Si Cornell said that politicians have to place people for various reasons and one of these happened to be the Domestic Relations Court. He stated that since Rufus "Snowshoe" Smith bragged openly that he could cause trouble in the colored community, Rufus "Snowshoe" Smith was given a job.

In response to a question about whether he knew that Rufus "Snowshoe" Smith had a police record, Si Cornell answered "yes," T. 1338. In response to a question, T. 1338-1339, as to whether he would put him on the payroll, Si Cornell said "I wouldn't even talk to him."

Si Cornell testified that he believed Rufus "Snowshoe" Smith to be perfectly capable of making threats whether he would implement them or not, T. 1343, 1344.

Judicial Canon 12, the first paragraph thereof, reads as follows:

> "12. Appointees of the Judiciary and Their Compensation.
>
> "Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments."

The violation of this Canon in the hiring of Rufus "Snowshoe" Smith is too obvious to bear further comment.

CONCLUSION

For all the above reasons, the petition for write of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Brief in Opposition to the petition for writ of certiorari, including the appendix hereto, upon Stanley E. Preiser, 1012 Kanawha Boulevard, East, P.O. Box 2506, Charleston, West Virginia, 25329, by depositing the same in the United States mail, postage prepared by air mail this 11th day of April, 1973.

R. O. KLAUSMEYER
Counsel for Respondent

APPENDIX

SUPREME COURT OF THE UNITED STATES
Washington, D. C. 20543

February 5, 1970

Dear Mr. Beirne:

I was pleased to receive the editorial from the Cincinnati Post and your letter of the 29th.

I hasten to reassure you that I have indeed delineated Ohio as a leader in handling grievance procedures. You have one of the best programs in the country, and I have repeatedly emphasized that your state is an example of what we should aim for in our proposals.

Keep up the good work!

With my congratulations on your fine program and my best wishes.

Sincerely,

/s/ TOM C. CLARK

MR. C. R. BEIRNE
Beirne, Wirthlin & Manley
3312 Carew Tower
Cincinnati, Ohio 45202

RULE XVIII [1]

DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1*, comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2*, comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3*, comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4*, comprising Lucas County. *District 5*, comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6*, comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7*, comprising Franklin County. *District 8*, comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. *District 9*, comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10*, comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. *District 11*, comprising Portage and Summit Counties. *District 12*, comprising Cuyahoga County. *District 13*, comprising Ashtabula, Columbiana, Geauga, Lake, Mahoning and Trumbull Counties. *District 14*, comprising Carroll, Stark and Tuscarawas Counties. *District 15*, com-

[1] Same as former Rule XXVII as amended March 11, 1964.

prising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16*, comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17*, comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, each of whom shall have authority to execute journal entires on behalf of the Board of Commissioners and of panels thereof.

(2) **Jurisdiction of Board.** The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State.

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court but did not take place in the actual presence thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

(4) Application of Rule; Authority and Duty of Local Committees. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where misconduct, contempt, or mental illness is found; provided, however, that nothing herein shall affect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

(5) Definitions.

(a) Misconduct. Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) Mental Illness. Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

(6) Manner of Discipline. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) **Effect of Discipline.** A person disbarred shall never thereafter be readmitted to the practice of law in this State. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) **The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent

said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

(9) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

(b) Suspension of Right to Practice Pending Disposition of Misconduct Complaint. After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by a certified copy of the judgment entry of the Court convicting the Respondent.

(c) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination as provided in (d) hereof, the Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

(d) Examination. If the complaint or answer alleges existing mental illness unsupported by a journal entry of